[redacted]

SUPREME COURT OF THE UNITED [redacted]

[redacted]

No. [redacted]

[redacted]

JOHN G. PRIDGEN, PLAINTIFF IN [redacted]

vs.

THE CITY OF ST. LOUIS.

[redacted]

IN ERROR TO THE SUPREME COURT OF [redacted]

[redacted]

[redacted]

(14,[redacted])

(18,803.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1903.

No. 204.

---

JOHN G. FISCHER, PLAINTIFF IN ERROR,

*vs.*

THE CITY OF ST. LOUIS.

---

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

---

INDEX.


| | Original. | Print. |
|---|---|---|
| Writ of error | 1 | 1 |
| Return to writ | 1½ | 2 |
| Citation | 2 | 2 |
| Acceptance of service of citation | 2½ | 2 |
| Caption | 3 | 3 |
| Transcript from St. Louis court of criminal correction | 3 | 3 |
| Proceedings in second district police court | 3 | 3 |
| Complaint | 3 | 3 |
| Summons issued, &c. | 4 | 4 |
| Motion to quash overruled | 5 | 4 |
| Motion to quash | 5 | 4 |
| Agreed statement of facts | 6 | 5 |
| Exhibit A—Ordinance No. 18407 to regulate cow stables and dairies, April 6, 1896 | 7 | 6 |
| Objections of defendant to ordinance | 16 | 12 |
| Assessment of fine and exception thereto | 17 | 12 |
| Motion for new trial | 17 | 13 |
| Motion in arrest of judgment | 18 | 14 |
| Motion for judgment *non obstante veredicto* | 19 | 14 |


---

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 10, 1903.

| | Original | Print |
|---|---|---|
| Order overruling motions and exception thereto | 19 | 15 |
| Allowance of appeal | 20 | 15 |
| Allowance of bill of exceptions | 20 | 15 |
| Order to send case to supreme court of Missouri | 20 | 15 |
| Clerk's certificate | 20 | 15 |
| Submission in division No. 2 | 21 | 16 |
| Order to transfer cause to court in banc | 21 | 16 |
| Submission in court in banc | 21 | 16 |
| Judgment | 21 | 16 |
| Opinion of Gantt, J., in division No. 2 | 22 | 17 |
| Order of court in banc adopting opinion of Gantt, J | 31 | 23 |
| Order filing motion for rehearing | 31 | 23 |
| Motion for rehearing | 31 | 23 |
| Order overruling motion for rehearing | 33 | 24 |
| Order allowing writ of error, &c | 33 | 25 |
| Bond on writ of error | 33 | 25 |
| Order filing assignment of errors | 36 | 27 |
| Assignment of errors | 36 | 27 |
| Clerk's certificate | 38 | 28 |

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the October term, 1901, thereof, between The City of St. Louis, respondent and John G. Fischer, appellant, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at Washington, D. C., not exceeding thirty days from and after the date of the citation in this cause, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of June, in the year of our Lord one thousand nine hundred and two.

Issued at office in the city of Jefferson with the seal of the circuit court of the United States, for the western district of Missouri, central division dated as aforesaid.

{ Seal of the United States Circuit Court for the Western District of Missouri, Central Division. }

H. C. GEISBERG,
*Clerk Circuit Court United States, Western District of Missouri, Central Division.*

Allowed by

G. D. BURGESS,
*Chief Justice.*

1½ [Endorsed:] No. — United States circuit court, western district of Missouri, central division City of St. Louis, resp't *vs.* John G. Fischer app'l't Writ of error to the supreme court of the State of Missouri. Filed Jun- 30 1902 Jno. R. Green clerk.

*Return to Writ.*

UNITED STATES OF AMERICA, }
*Western District of Missouri,* } ss:

*In obedience to the command of the within writ,* I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case together with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 16th day of July, A. D. 1902.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk,*
By SPEED MOSBY, *D. C.*

2 The United States of America to the City of St. Louis Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Missouri, wherein John G. Fischer is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Gavon D. Burgess chief justice of the supreme court of Missouri, this 25" day of June in the year of our Lord one thousand nine hundred and two.

G. D. BURGESS,
*Chief Justice.*

2½ [Endorsed:] Supreme court of Missouri. City of St. Louis, resp't *vs.* John G. Fischer, app'l't. Citation. Filed Jun- 30, 1902, Jno. R. Green, clerk.

UNITED STATES OF AMERICA, }
*Eastern District of Missouri,* } ss:

I hereby acknowledge due service of the within citation, this 28th day of June A. D. 1902.

CHAS. W. BATES,
*Attorney for Defendant in Error.*

3 STATE OF MISSOURI, *sct:*

In the Supreme Court of Missouri.

Be it remembered, that heretofore to-wit, on the 15th day of September, 1899, there was filed in the office of the clerk of the supreme court of the State of Missouri, a transcript from the St. Louis court of criminal correction, wherein The City of St. Louis was respondent and John G. Fischer was appellant, which said transcript is in words and figures as follows, to-wit:

STATE OF MISSOURI, }
*City of St. Louis,* } *ss:*

In the St. Louis Court of Criminal Correction.

Be it remembered, that on the 21st day of January in the year of our Lord eighteen hundred and ninety-nine, there was filed in the office of the clerk of the St. Louis court of criminal correction, by the clerk of the 2nd police district court of the city of St. Louis, a transcript and the papers in the case of The City of St. Louis *versus* John G. Fischer; which transcript and papers are in the words and figures following, to-wit:

STATE OF MISSOURI, }
*City of St. Louis,* } *ss:*

In the St. Louis Court of Criminal Correction.

CITY OF ST. LOUIS, Plaintiff, }
*vs.*
JOHN G. FISCHER, Defendant. }

Be it remembered that on November 22, 1898, the assistant city attorney of the city of St. Louis, filed in the second district police court, in the city of St. Louis, Missouri, his complaint against defendant herein, in words and figures as follows:

John G. Fischer to the City of St. Louis, Dr.

To five hundred dollars, for the violation of an ordinance of said city entitled "An ordinance in revision of the ordinances of
4 the city of St. Louis, and to establish new ordinance provisions for the government of said city," being ordinance number 18,407, section 5, approved April 6, 1896.

In this, to wit; in the city of St. Louis, and State of Missouri, on the 16th day of November, 1898, and on divers other days and times prior thereto, the said John G. Fischer, being the (1) occupant

of the premises known as 7208 and 7210 North Broadway, in said city, did then and there erect, build and establish on said premises a dairy and cow stable, without first having obtained permission so to do from the municipal assembly by proper ordinance (2) and furthermore said defendant did at said time and place maintain said dairy and cow stable, permission so to do not having been obtained from the municipal assembly by proper ordinance, said dairy and cow stable not having been in operation at the time of the approval of ordinance No. 18,407 to wit: April 6th, 1896.

Contrary to ordinance in such case — and provided.

On information of Charles W. Francis.

ERNST C. DODGE,
*Ass't City Attorney of the City of St. Louis.*

Thereupon a summons was issued, returnable November 29, 1898. Defendant appeared, and after various continuances, defendant filed his motion to quash the statement in the above entitled cause, which motion was in the said court overruled. The cause coming on for trial, January 14th, 1899, and defendant appearing, defendant was fined $100.00; and thereupon, and on the same date, defendant made and filed his affidavit for appeal, and made and filed his bond for such appeal; his bond was duly approved and appeal granted to the St. Louis court of criminal correction.

And now, on January 21, A. D. 1899, the foregoing papers, complaint, summons, motion to quash, affidavit for appeal, and appeal bond and transcript of the proceedings in the second district police court were filed in the court of criminal correction in the said city of St. Louis. By leave of court the defendant's motion to quash the city attorney's statement as filed in the police court was refiled in the St. Louis court of criminal correction, duly argued and submitted to the court and by the court overruled, to which action of the court in overruling said motion, the defendant then and there duly saved his exceptions; said motion to quash is in words and figures as follows, to-wit:

In the Second District Police Court.

CITY OF ST. LOUIS
*vs.*
FISHER.

Now comes defendant and moves the court to quash the writ and statement in above entitled cause, for the following reasons, to-wit:

1st. Because the statement does not set forth facts sufficient to constitute any offense under the ordinances of the city of St. Louis.

2nd. Because section five of said ordinance No. 18407 is unconstitutional and void for the reason that it operates to deprive a person of property without due process of law.

3rd. Because said section five is void as being unreasonable and oppressive to the citizen and the property owner.

4th. Because said section is void there being no power or authority granted to the municipal assembly by the charter of the city of St. Louis to pass the same.

5th. Because said section five is retrospective in its nature and application, therefore in violation of the rights of private property.

6th. Because said section five is void, being a delegation of the powers of the municipal assembly.

7th. Because said section five is in violation of section 30, art. II, of the constitution of the State of Missouri.

8th. Because said section five is in violation of section 4 of art. II of the constitution of the State of Missouri.

6 9th. Because said section five is void as being in violation of the XIV amendment to the Constitution of the United States in that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

E. F. STONE,
*Att'y for Def't.*

The cause, then, after several continuances, was called for trial in the St. Louis court of criminal correction, the defendant pleading not guilty, the cause was submitted on an agreed statement of facts as follows:

In the St. Louis Court of Criminal Correction.

CITY OF ST. LOUIS }
*vs.*
JOHN G. FISCHER. }

*Agreed Statement of Facts.*

It is hereby agreed and stipulated by and between the parties to the above entitled cause by their respective attorneys, that said cause may be submitted and tried upon the following statement of facts, to-wit:

The plaintiff, The City of St. Louis, is a municipal corporation, organized and existing under the laws of the State of Missouri, and defendant is and was on the sixteenth day of November, 1898, the occupant of certain premises known as 7208 and 7210 North Broadway, in the city of St. Louis, State of Missouri, upon which premises, at said time, stood a dwelling house and frame stable which had been erected and built prior to the occupancy of said premises by defendant.

At the time of the approval of ordinance No. 18407, of said city and State, said premises, buildings, and stable were occupied and in use by a certain party other than this defendant for the purpose

of operating a dairy and maintaining a cow stable, and this
7 defendant was, at the same time, operating a dairy and maintaining a cow stable on premises known as No. 6305 Bulwer avenue, said city and State. Sometime in the month of March 1898, the said premises at Nos. 7208 and 7210 North Broadway *were abandoned* as a dairy and cow stable, and the dwelling house thereon was occupied by a private family for *residence purposes only*, and no dairy or cow stable was maintained on said premises from March 1898, until sometime in September, 1898. In September, 1898, defendant moved his cows, about thirty in number, from premises No. 6305 Bulwer avenue, said city, on to premises Nos. 7208 and 7210 North Broadway, said city, placed them in an old stable, and did proceed to conduct upon said premises a dairy establishment and produce from said cows milk, and sell the same to his customers for profit, and was doing so on the said sixteenth day of November, 1898, without having first obtained permission so to do from the municipal assembly by proper ordinance as provided by section 5 of ordinance No. 18,407 of the city of St. Louis, approved April 6, 1896.

It is hereby stipulated and agreed by the parties to this cause by their respective attorneys that the printed ordinance marked "Exhibit A" which is attached to and made a part of this agreed statement of facts is a full, true and correct copy of said ordinance No. 18,407, and may be considered in evidence in this cause.

CHARLES H. BROCK,
*Attorney for Plaintiff.*
LOUIS A. STEBER,
*Attorney for Defendant.*

Said ordinance No. 18,407 is in words and figures, as follows:

(18,407.)

An ordinance to regulate cow stables and dairies within the corporate limits of the city of St. Louis, prescribing how they may be maintained, defining when they shall be deemed a nui-
8 sance, providing for their inspection by veterinary surgeons and sanitary officers, and fixing the salaries of the veterinary surgeons. Also, to repeal section four hundred and eleven of article eleven, chapter fourteen, and section three hundred and seventy-three, of article eight of chapter fourteen of the Revised Ordinances of the City of St. Louis of One thousand eight hundred and ninety-three.

Be it ordained by the municipal assembly of the city of St. Louis, as follows:

SECTION 1. All dairies, cow stables and cow lots in the city of St. Louis shall conform to and be managed and regulated as shall be provided for by this ordinance.

SEC. 2. It shall be the duty of the sanitary officers of the health

department to inspect all stables, barns, buildings, sheds and all places of any kind, including lots and pastures where cows are kept or fed, whose milk or cream is sold, used, delivered or disposed of in the city of St. Louis.

SEC. 3. All cow stables shall be washed out and thoroughly cleaned at least once a day, and all cow lots or cow yards shall be cleaned once a week. No liquid discharge from any cow stable or dairy or cow lot shall be conducted or placed on any public or private property or into any stream or water course within the limits of the city. All dairies and milk depots shall have suitable facilities for the keeping and cooling of milk. All persons, firms or corporations who own or keep a dairy or cow lot shall maintain the premises free from any accumulation of manure or refuse whatever. Every person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars nor more than one hundred dollars for each and every offense.

SEC. 4. No dairy or cow stable shall be hereafter erected or established unless it will have connection with the city sewer system, if such be practicable. No dairy shall be allowed to discharge into any public district or private sewer any manure or any substance that may cause said sewer to choke up, and no dairy shall have connection with any public district or private sewer except through two intervening catch basins of such kind as may be prescribed by the board of public improvements so as to prevent any straw, hay or manure from entering the sewer. Any person interfering with said catch basins or failing to construct said catch basins or violating any of the provisions of this section, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five nor more than one hundred dollars.

9

SEC. 5. No dairy or cow stable shall hereafter be erected, built or established within the limits of this city without first having obtained permission so to do from the municipal assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on any premises unless permission so to do shall have been obtained from the municipal assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred nor more than five hundred dollars.

SEC. 6. Before the building commissioner shall issue a permit for the erection, building or establishment of any dairy or cow stable, there shall be made to him in duplicate by the persons or parties so desiring to do, an application in writing, to which shall be attached a certified copy of the ordinance giving the permission. The application shall set forth:

First. The location of the proposed dairy or cow stable.

Second. The name of the party or parties proposing to go into the dairy business.

Third. The name or names of the owner or owners of the ground on which the dairy or cow stable is to be located.

Fourth. The number of cows proposed to be kept.

Fifth. The size and dimensions of the stable.

Sixth. The dimensions and boundaries of the lot or pasture
10 in which the cows are to be turned out.

Seventh. Whether the cow stable can be connected with the sewer system of the city or not.

Eighth. If it can not be connected with the sewers what arrangements exist, if any, for the removal of manure and liquid from the stable.

Ninth. Whether the stable can be supplied with city water, and if not, what arrangements exist for cleaning out the same.

The building commissioner shall forward one of said applications to the health commissioner.

SEC. 7. All cow stables hereafter erected, built or established, shall comply with the following regulations: All single stalls shall be at least three feet wide, double stalls six feet wide, and all stalls shall be at least seven feet long; the height of ceilings from the floor shall be at least eight feet; the floors must be of tight plank, or be paved with brick or stone, laid in cement; if paved with brick or stone, then the earth below it shall be sufficiently solid to prevent its becoming a receptacle of filth and offensive matter; the floors of the stalls shall slope down into a drain or gutter, which shall be at least twelve inches wide and four inches deep, and said drain or gutter shall connect with and lead into a sewer through two intervening catch basins or tightly cemented cesspool, so that waste matter can be carried or hauled away. Openings for ventilation must be placed on at least two sides of the building, with openings not less than two feet square for every double stall or two single stalls, and there must be roomy ventilators in the roof not less than one for every twenty feet or fraction thereof in the length of the building. All cow stables hereafter to be built or established, except the entrance from or exit to, with street or alley, or casement or passageway, shall be at least three feet away from the building line. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined not less than
11 fifty dollars nor more than one hundred dollars for each and every day the work is done thereon, or said cow stables used as such, each day of which shall constitute a separate and distinct offense.

SEC. 8. In the construction, alteration and improvement of all cow stables, arrangements for proper ventilation, light and drainage shall be made, and all alterations and improvements in cow stables now constructed shall be made to conform with the provisions in relation to new stables as provided for in section seven of this ordinance.

SEC. 9. All dairies or cow stables, now erected or established, when found to be so badly lighted or ventilated as to be injurious or unhealthy for cows, or not provided with legal catch basins or

tightly cemented cesspools, so that waste matter can be carried or hauled away, or shall be conducted in an uncleanly manner, shall be deemed a nuisance. It shall be the duty of the board of health when any report shall be made of the bad or improper construction of any dairy or cow stable, or of any nuisance created by any dairy, cow stable or cow lot, to notify the owner or proprietor thereof to show cause before the said board of health at the time and place specified in said notice, why said dairy or cow stable should not be altered or changed, or such defects remedied or nuisance removed, which notice for the party complained against to appear shall be served at least five days before the date specified in such notice; said notice shall be served by leaving the same at the place of business or residence of the parties to be affected thereby by some officer or person duly qualified to certify to such notice; and all notices of this kind issued by the board of health shall be signed by the presiding officer of the board of health or the health commissioner. At the time fixed in said notice the parties may appear in person or by attorney, or cause may be shown by affidavit, and if in the opinion of the board of health and health commissioner no good and sufficient cause be shown why the said nuisance should not be abated, discontinued or removed, or said cow stables recon-
12 structed, the health commissioner shall order the said parties to abate, discontinue, remove or reconstruct the same within such time as the health commissioner may deem reasonable and necessary. If, upon the hearing of the affidavits and the evidence adduced in the case, the board shall find the facts to be in favor of the parties before them, and so decide, the case shall be dismissed.

SEC. 10. Any person or persons failing or refusing to obey such order of said health commissioner shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than five hundred dollars; and such person or persons shall be subject to like fines for each and every day he, she or they shall continue such nuisance or fail to obey the order of the health commissioner after the expiration of the time specified in the order of the health commissioner for the abatement, removal or discontinuance of the same. The fines mentioned in this ordinance shall be collected as other fines and paid into the city treasury.

SEC. 11. The health commissioner, by and with the approval of the board of health, shall appoint two practical veterinary surgeons as inspectors of live stock, who shall perform their duties under the immediate supervision of the chief sanitary officer. Said veterinary surgeons shall each receive a salary of one hundred and seventy-five dollars per month, and shall each provide himself with a horse and buggy and maintain same at his own expense for the expeditious performance of his duties. Said veterinary surgeons may be discharged by the health commissioner with the approval of the board of health for violation of rules or neglect of duty.

SEC. 12. The veterinary surgeons appointed under the provisions of this ordinance shall each give a good and sufficient bond to the city of St. Louis in the penal sum of five thousand dollars, said bond

to be approved by the mayor and council, and the conditions of said bond shall be that veterinary surgeons shall well and faithfully execute and perform the duties of their office; provided that no one shall be competent to serve as bondsmen for said
13 veterinary surgeons who shall be either directly or indirectly interested in the milk or dairy business.

SEC. 13. Said veterinary surgeons and sanitary officers shall have the right, and it shall be their duty to have full access, egress and ingress to all places, buildings, cow yards, cow lots and cow stables where cows are kept for milking purposes or for purposes of sale; and they shall have the right, and it shall be their duty to examine all cows to determine whether the same are sick or diseased or have been exposed to or have been contaminated or affected by any contagious or infectious disease. Any person or persons who in any manner interferes, hinders, obstructs, delays, resists, denies, prevents, or in any manner interferes or attempts to interfere, with said veterinary surgeons or sanitary officers in the discharge of their duties, or any person or persons being the owner, agent or manager of any cow stable, dairy or cow lot, or any building where cows are stabled or may be kept, who shall refuse to permit any cow to be viewed or inspected by said veterinary surgeons, or who attempts to conceal, run or drive away any cow supposed to be diseased, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined not less than fifty dollars nor more than five hundred dollars for each and every offense.

SEC. 14. Veterinary surgeons shall each, when on duty, wear a metal badge, which badge shall be numbered, and shall have the words "Veterinary surgeon of health department of city of St. Louis," plainly marked on same. Said badge shall be supplied by and be the property of the city.

SEC. 15. The health commissioner is hereby empowered to require said veterinary surgeons to go outside the corporate limits of the city of St. Louis to any point within a radius of one hundred and fifty miles, to examine the physical condition of cows whose milk is or may be brought into the city of St. Louis for sale; and all vouches for traveling expenses incurred by said veterinary surgeon or surgeons in the discharge of this duty when signed by the health commissioner and approved by the board of health, shall be
14 paid out of the fund appropriated for the expense of the board of health and health commissioner.

SEC. 16. When said veterinary surgeon or surgeons shall find any cow or cows in a dairy, from which dairy milk is brought into this city for sale, to be diseased, they shall immediately make a report of the facts in duplicate; one of said reports to be delivered to the health commissioner and the other to the person, firm or corporation receiving and disposing of the milk from such cows. On receipt of a report that milk from diseased cows is being brought into this city the health commissioner shall issue an order forbidding its sale in the city of St. Louis until such time as the health commissioner is satisfied by approved veterinary certificate that such dis-

eased cows have been separated from the balance of the herd; and if the parties who shall have been served with such order fail to obey the same, the health commissioner is hereby empowered to give notice to the citizens of St. Louis through the newspapers doing the city printing, stating all the facts in the case, and to warn them against the use of such milk. And said parties may be proceeded against in the manner prescribed by the provisions of this ordinance.

SEC. 17. Any person, firm or corporation having in possession a sick or diseased cow shall forthwith report said fact at the office of the health commissioner, who shall thereupon at once examine or direct any veterinary surgeon to make examination thereof. Any sick horse or other animal kept in or about stable, premises or places where milch cows are kept or milked, shall in like manner be reported. For any failure, neglect or delay in so reporting any sick or diseased cow or other sick animal, the offender shall be deemed guilty of a midemeanor, and upon conviction, shall be fined not less than twenty-five dollars nor more than one hundred dollars.

SEC. 18. If any cow be found sick or diseased the owner or the person in charge thereof shall not sell, offer for sale, exchange, deliver or keep, expose for sale, exchange or deliver the milk or cream thereof, but shall at once destroy the same. If, in the opinion of the veterinary surgeon, or any inspector, said cow is afflicted with a contagious or infectious disease, he shall direct the owner or person in charge thereof to forthwith remove said cow from the premises to a place where it may not spread or cause contagion or infection. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined not less than twenty-five dollars nor more than one hundred dollars. If, in the opinion of, and after an examination by the veterinary surgeon, said cow is deemed incurable, and the owner or person in charge thereof does not consent to its being killed, such officials shall cause two disinterested and experienced persons to view and examine the same. If said persons agree and certify in writing that said sickness or disease is incurable and likely to spread contagion or infection, and the health commissioner, in writing, approves said finding and judgments, the veterinary surgeon shall forthwith kill said animal and see that the carcass is removed and so disposed of that it cannot be sold for human food. If cows in any dairy located outside of the city limits are found to have any contagious disease the veterinary surgeons shall mail a notice of such fact to the State authorities.

SEC. 19. Any officer or employé of the city of St. Louis who wilfully connives at or assists in a violation of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and on conviction thereof be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and shall at once forfeit his office as provided by law in this ordinance.

SEC. 20. Whenever in any house connected with any dairy there is any case of smallpox, diphtheria, scarlet fever or typhoid fever,

the sale of milk from such dairy or depot is prohibited until the disease has terminated and the premises fumigated. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty nor more than one hundred dollars.

16 SEC. 21. Any person failing to comply or violating any of the provisions of this ordinance, for which no special penalty has been prescribed shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than twenty nor more than five hundred dollars.

SEC. 22. Section four hundred and eleven of article eleven, chapter fourteen, and section three hundred and seventy-three of article eight, of chapter fourteen, of the Revised Ordinances of the City of St. Louis, approved April seventh, eighteen hundred ninety-three, are hereby repealed.

Approved April 6th, 1896.

To the introduction of which section 5 of said ordinance the defendant objected on the ground that it is unconstitutional and void for the reason that it tries to deprive a person of property without due process of law: because it is void as being unreasonable and oppressive to the citizen and property owner: because it is void for want of power or authority granted to the municipal assembly by the charter of the city of St. Louis to pass the same: because it is retrospective in its nature and application, and therefore in violation of the rights of private property: because it is void as being a delegation of the powers of the municipal assembly: because it is void as being in violation of the XIV amendment to the Constitution of the United States in that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal — of the laws:" because it is foreign to the provisions of, and not in conformity with, the city charter of the city of St. Louis, arts. 3, section 26, paragraph 6: because it is in violation of the provisions of the constitution of Missouri, particularly in arts. II, section 4, articles II, section 15, articles II, section 30.

17 Thereupon, the court, on March 11, 1899, the case being duly submitted, after having carefully considered the law and the evidence assessed a fine of $100 and the cost upon the defendant, to which action of the court on March 11, 1899, the defendant then and there duly excepted.

And now, on March 14, 1899, the defendant filed his motion for a new trial in words and figures as follows:

STATE OF MISSOURI, }
*City of St. Louis,* } ss:

In the St. Louis Court of Criminal Correction.

CITY OF ST. LOUIS, Plaintiff, }
*vs.*
JOHN G. FISCHER, Defendant. }

Now comes defendant and moves the court to set aside the verdict and judgment herein, and grant to him a new trial for the following reasons, to-wit:

First. Because under the stipulated facts the verdict and judgment should have been for the defendant:

Second. Because the court erred in its conclusions of law under the stipulated facts:

Third. Because the ordinance on which this prosecution is founded is unconstitutional and void,

(*a.*) As being foreign to the provisions of, and not in conformity with, the city charter of the city of St. Louis, article 3, section 26, paragraph sixth;

(*b.*) As being in violation of the provisions of the constitution of Missouri, particularly in article 2, section 4, article 2, section 15, and article 2, section 30;

(*c.*) As being in violation of the Constitution of the United States, in article 14, section 1, in each of its parts;

(*d.*) That if the provisions of the city charter of the city of St. Louis in article 3 section 26, paragraph sixth, bear the construction placed upon them by this court, they are void, repugnant to, and in conflict with, the constitution of Missouri and the Constitution of the United States as indicated in this motion in points third *b* and third *c*;

Fourth. Because the verdict is against the law;

Fifth. Because the verdict is against the evidence;

Sixth. Because the verdict is against both the law and the evidence, and the law under the evidence;

Seventh. Because the court erred in failing to pass upon the question of the constitutionality or unconstitutionality of the ordinance, as it was in duty bound to do.

LOUIS A. STEBER,
*Att'y for Defendant.*

Defendant also at the same time filed his motion in arrest of judgment, which motion is in words and figures as follows:

STATE OF MISSOURI, }
*City of St. Louis,* } ss:

In the St. Louis Court of Criminal Correction.

CITY OF ST. LOUIS, Plaintiff, }
*vs.* }
JOHN G. FISCHER, Defendant. }

Now comes the defendant and moves the court to arrest the judgment rendered in this cause and for his discharge herein, for the following reasons, to-wit:

First. Because under the stipulated facts the verdict and judgment should have been for the defendant;

Second. Because the court erred in its conclusions of law under the stipulated facts;

Third. Because the ordinance on which this prosecution is founded is unconstitutional and void;

(*a.*) As being foreign to the provisions of, and not in conformity with, the city charter of the city of St. Louis, in article 3, section 26, paragraph sixth;

(*b.*) As being in violation of the provisions of the constitution of Missouri, particularly in article 2, section 4, article 2, section 15, article 2, section 30;

19 (*c.*) As being in violation of the Constitution of the United States in article 14, section 1, in each of its parts;

(*d.*) That if the provisions of the city charter of the city of St. Louis in article 3, section 26, paragraph sixth, bear the construction placed upon them by this court, they are void, repugnant to and in conflict with the constitution of Missouri and the Constitution of the United States as indicated in this motion in points third *b* and third *c;*

Fourth. Because the verdict is against the law,

Fifth. Because the verdict is against the evidence,

Sixth. Because the verdict is against both the law and the evidence, and the law under the evidence.

LOUIS A. STEBER,
*Att'y for Defendant.*

Defendant further at the same time filed his motion for judgment *non obstante veredicto,* in words and figures as follows:

STATE OF MISSOURI, } ss:
*City of St. Louis,* }

In the St. Louis Court of Criminal Correction.

CITY OF ST. LOUIS, Plaintiff, }
*vs.* }
JOHN G. FISCHER, Defendant. }

Now comes defendant and moves for a verdict and judgment herein in his favor upon the undisputed and stipulated facts, notwithstanding the verdict and judgment herein rendered.

LOUIS A. STEBER,
*Att'y for Defendant.*

All of the said motions being duly argued and submitted to the court, were duly taken under advisement and having been fully considered by the court, the court, on July 15th, 1899, overruled all of said motions, to which action of the court, in overruling each and every one of said motions, the defendant then and there duly excepted to each separate action of the court in overruling each of said motions.

20 Now, on said July 15, 1899, the defendant filed his affidavit for appeal, and gave an appeal bond, which was duly approved by the court, and prayed for his appeal to the supreme court of Missouri, which appeal was duly granted as prayed for.

Now inasmuch as many of the foregoing acts are not of record in this cause, the defendant presents them herewith in this, his bill of exceptions, and prays they may be made of record herein, and that this bill of exceptions be also duly allowed and made a part of the record in this cause, which, having been considered and examined by the court, is this fifteenth day of July, 1899, duly granted and allowed by the judge of the St. Louis court of criminal correction.

And now it is further ordered by the court that this cause, together with a transcript of the same, be duly certified to the honorable *of the* supreme court of Missouri for further action herein as the said court may deem just and proper.

WILLIS H. CLARK,
*Judge St. Louis Court of Criminal Correction.* [SEAL.]

STATE OF MISSOURI, } ss:
*City of St. Louis,* }

I, Alfred J. Wagenman, clerk of the St. Louis court of criminal correction, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings had in said court, in the cause of The City of St. Louis *versus* John G. Fischer, as fully as the same remains of record and on file in my office.

[SEAL.] In testimony whereof, I have hereto set my hand and affixed the seal of said court at office, in the city of St. Louis, this 21st day of August, in the year of our Lord eighteen hundred and ninety-nine.

ALFRED J. WAGENMAN, *Clerk.*

21 And afterwards, to-wit, on the 19th day of October, 1901, the following proceedings were had in said cause, viz:

ST. LOUIS, Respondent,
*vs.*
JNO. G. FISCHER, Appellant.

Come now the said parties by attorneys, and after arguments herein, submit this cause to the court on briefs.

And afterwards to-wit, on the 7th day of January, 1902, the further following proceedings were had in said cause, viz:

ST. LOUIS, Respondent,
*vs.*
JNO. G. FISCHER, Appellant.

Now at this day, it is ordered by the court that this cause be transferred to the court in banc.

And afterwards to-wit, on the 24th day of January, 1902, the further following proceedings were had in said cause, viz:

CITY OF ST. LOUIS, Respondent,
*vs.*
JOHN G. FISCHER, Appellant.

Come now the said parties by attorneys, and after arguments herein, submit this cause to the court.

And afterwards to-wit, on the 19th day of February, 1902, the further following proceedings were had in said cause, viz:

CITY OF ST. LOUIS, Respondent,
*vs.*
JOHN G. FISCHER, Appellant.
Appeal from St. Louis Court of Criminal Correction.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said St. Louis court of criminal correction rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover
22 against the said appellant its costs and charges herein expended, and have therefore execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, Division No. 2, October Term, 1901.

THE CITY OF ST. LOUIS, Respondent,
*vs.*
JOHN G. FISCHER, Appellant.

This is a civil action by the City of St. Louis to recover a fine of $100.00 for the violation of section 5 of a city ordinance of said city numbered 18407, approved April 6th, 1896, which said section is in these words:

"No dairy or cow stable shall hereafter be erected, built or established *within the* limits of this city without first having obtained permission so to do from the municipal assembly by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on the premises unless permission so to do shall have been obtained from the municipal assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars nor more than five hundred dollars."

The complaint charged that defendant in the city of St. Louis and State of Missouri *did* on the 16th day of November, 1898, and on divers other days and times prior thereto was the occupant of certain premises known as 7208 and 7210 North Broadway in said city, and did then and there erect, build, and establish on said premises a dairy and cow stable without first having obtained permission so to do from the municipal assembly by proper ordinance, and furthermore did at said times and place maintain said dairy and cow stable without having obtained permission from said municipal assembly of said city by proper ordinance and that said dairy and cow stable was not in operation at the time of the approval of said ordinance No. 18407, to wit, April 6th, 1898, contrary to the said ordinance.

23 The defendant was found guilty in the police court and appealed to the court of criminal correction. In the last mentioned court he moved to quash the complaint on nine grounds, as follows:

1st. Because the statement does not set forth facts sufficient to constitute any offense under the ordinances of the city of St. Louis.

2nd. Because section 5 of said ordinance No. 18407 is unconstitutional and void for the reason that it operates to deprive a person of property without due process of law.

3rd. Because said section 5 is void as being unreasonable and oppressive to the citizen and the property owner.

4th. Because said section is void, there being no power or authority granted to the municipal assembly by the charter of the city of St. Louis to pass the same.

5th. Because said section is retrospective in its nature and application and therefore in violation of the rights of private property.

6th. Because said section 5 is void, being a delegation of the powers of the municipal assembly.

7th. Because said section is in violation of section 30 art. II of the constitution of the State of Missouri.

8th. Because said section 5 is in violation of section 4 of article II of the constitution of Missouri.

9th. Because said section 5 is void as being in violation of the XIV amendment to the Constitution of the United States in that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

The court of criminal correction overruled this motion and thereupon — entered his plea of not guilty and the cause was submitted to
24 that court upon an agreed statement of facts, without a jury, and the court found defendant guilty of a violation of said ordinance and fined him $100.00; from which he appeals to this court.

The agreed statement of facts is in these words:

"It is hereby agreed and stipulated by and between the parties to the above entitled cause by their respective attorneys, that said cause may be submitted and tried upon the following statement of facts, to-wit:

The plaintiff, The City of St. Louis, is a municipal corporation, organized and existing under the laws of the State of Missouri, and defendant is and was on the sixteenth day of November, 1898, the occupant of certain premises known as 7208 and 7210 North Broadway, in the city of St. Louis, State of Missouri, upon which premises, at said time, stood a dwelling house and frame stable which had been erected and built prior to the occupancy of said premises by defendant.

At the time of the approval of ordinance No. 18,407 of said city and State, said premises, buildings, and stable were occupied and in use by a certain party other than this defendant for the purpose of operating a dairy and maintaining a cow stable, and this defendant was, at the same time, operating a dairy and maintaining a cow stable on premises known as 6305 Bulwer avenue, said city and State. Sometime in the month of March, 1898, the said premises at Nos. 7208 and 7210 North Broadway were abandoned as a dairy and cow stable, and the dwelling house thereon was occupied by a private family for residence purposes only, and no dairy or cow stable was maintained on said premises from March, 1898, until sometime in September, 1898. In September, 1898, defendant moved his cows, about thirty in number, from premises No. 6305 Bulwer avenue, said city, on to premises No. 7208 and 7210 North Broadway, said city, placed them in an old stable, and did proceed to conduct upon said premises a dairy establishment and produce from said cows

milk, and sell the same to his customers for profit; and was so doing on the said sixteenth day of November, 1898, without having
25 first obtained permission so to do from the municipal assembly by proper ordinance, as provided by section 5 of ordinance No. 18,407, of the city of St. Louis, approved April 6, 1896.

It is hereby stipulated and agreed by the parties to this cause by their respective attorneys that the printed ordinance marked Exhibit A, which is attached to and made a part of this agreed statement of facts, is a full, true and correct copy of said ordinance No. 18,407, and may be considered in evidence in this cause.

Section 5 of ordinance No. 18,407, with a violation of which defendant was charged, is as follows:

"SEC. 5. No dairy or cow stable shall hereafter be erected, built or established, within the limits of this city, without first having obtained permission so to do from the municipal assembly, by proper ordinance, and no dairy or cow stable not in operation at the time of the approval of this ordinance shall be maintained on any premises, unless permission so to do shall have been obtained from the municipal assembly by proper ordinance. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than one hundred nor more than five hundred dollars."

The transcript in this case is somewhat difficult to understand. It is either all record proper, or all bill of exceptions. There is nothing in the nature of the record proper showing a trial, the entry of judgment, the filing of any of the motions, or the action taken by the court thereon. There is nothing in the transcript showing any copy of the affidavit for appeal, the bond for appeal, or the order granting an appeal tot his court. There is nothing showing the filing of a bill of exceptions. At the same time these matters are set forth as if in a bill of exceptions, signed by the judge of the trial court.

## I.

The city of St. Louis is a municipal corporation, existing under a charter framed and adopted by the qualified voters therein
26 on the 22nd day of August, 1876, which took effect October 22nd, 1876, (State *ex rel. vs.* Sutton, 3 M. A. 388), pursuant to the provisions of sections 20, 21, 22, 23, 24 and 25 of article 9 of the constitution of Missouri, 1875, and has all the force and effect of a charter which emanates from the General Assembly, Kansas City *vs.* Oil Co. 140 Mo. 458. By the 6th paragraph of section 26 of article 3 of the said charter the mayor and the municipal assembly of St. Louis are given power within the city, by ordinance not inconsistent with the constitution or any law of this State or the charter itself, "to *prohibit* the erection of soap factories, stock yards, and slaughter houses, pig pens, *cow stables and dairies*, coal oil and vitriol factories, within prescribed limits, and to remove and regulate the same; and

to regulate or prevent the carrying on of any business which may be dangerous or detrimental to the public health."

On April 6th 1896, the mayor and municipal assembly passed the ordinance set out in the accompanying statement making it a misdemeanor for any person thereafter to erect, build or establish or maintain within the limits of said city any dairy or cow stable without having first obtained permission so to do from the municipal assembly by a proper ordinance and prescribing a penalty for a violation thereof.

At the outset it will be observed that *express power* is conferred upon the mayor and municipal assembly to *prohibit*, and to remove and regulate cow stables and dairies *within prescribed limits*.

To the mayor and assembly is confided the power of fixing and *prescribing* the limits within which no dairy or cow stable shall be built or maintained in the city of St. Louis. As the grant in the charter is express, we are relieved from any discussion to demonstrate that the dairy business is of a character that brings it within the police power of the State and properly subjects it to rigid rules of regulation, and even absolute prohibition in large and populous cities. Indeed, few occupations are so peculiarly liable to
27 cause injury by the sale of impure milk, to people who purchase milk as a necessary article of food or which are more generally regarded as nuisances, even under favorable circumstances.

That the people of the State could delegate this power to the municipality is no longer open to dispute. It clearly falls within the proper function of municipal government.

As the people of the State have conferred the power upon the city without restriction, it was entirely within the discretion of the mayor and assembly to prescribe the limits and it was competent to fix the boundaries of the city as the prescribed limits and this was done by the ordinance 18407.

Counsel for defendant insists that the municipal assembly must have first designated certain districts within the city by metes and bounds, within which no dairy or cow house should be erected or maintained, but the charter does not so command. It nowhere limits the prohibited territory to less than the whole city. Counsel for defendant cites *In re* Linehan, 72 Cal. 114 as sustaining his position. But reference to that case will show that the charter power was "to exclude *from certain limits*" the obnoxious occupations, and the city council had merely defined a district bounded by certain streets in which it should be unlawful for any person to keep more than two cows and the supreme court upheld the ordinance. No question of the power of the city of San Francisco to make such an ordinance applicable to the whole of said city arose in that case and nothing in the decision supports the proposition now advanced that the city of St. Louis must necessarily prescribe a district therein less than its municipal boundaries, and we have no doubt of the power under the charter to make the prescribed limits co-extensive with the city limits, and this we construe this ordinance to have done.

But the learned counsel for defendant argues that because the city

has not made the prohibition absolute and prevented all persons
from erecting or maintaining dairies and cow stables any-
28 where in the city but has deemed it proper to say that no
person should erect or maintain a dairy or cow stable without permission first obtained by a proper ordinance, this ordinance is void:

That it provides for special privileges to one man by special ordinance which it might deny to another man, his next door neighbor. We think his position is entirely untenable. The charter confers not only the power *to prohibit*, but to remove and *regulate* and it was entirely competent for the assembly to decline to prohibit dairies altogether, but to impose upon all persons desiring to erect or maintain a dairy or cow stable to first obtain permission from the mayor and assembly by a duly enacted ordinance. Having absolute power to prohibit, it could make its own conditions. Railroad *v.* Kirkwood, 159 Mo. 239. As was said in St. Louis *v.* Howard, 119 Mo. loc. cit. 46. "Regulation" means a rule or order for management or government." So that paragraph 6 of section 26 of article 3 of the charter empowers the city (*by ordinance, of course*, for that is the only way the city can legislate) to prescribe rules whereby slaughter houses may be erected or operated, or whereby such erection or operation may be checked or restrained, *either partially* or in toto, but in that case the defendant was acquitted because although the city had plenary powers in this regard, it had not seen fit to exercise them by an ordinance making it a misdemeanor to carry on or operate a slaughter house "*without first* having *obtained* permission so to do from the municipal assembly by proper ordinance."

In this case, the city has passed just such an ordinance and made it coextensive with the boundaries of the city, and just such an ordinance met the approval of this court in St. Louis *v.* Howard, 119 Mo. 47, the only difference being that in the last mentioned case it was forbidden to erect a slaughter house within three hundred feet of any dwelling house, whereas in this ordinance dairies are prohibited throughout the city unless the assembly shall first permit them by proper ordinances.

We are asked to declare this ordinance void in the face of
29 the unrestricted power in the charter because forsooth the
assembly may at sometime discriminate against one man and favor another. We cannot and shall not indulge any such presumption against the integrity of the municipal assembly, but shall, as was said in City *v.* Howard, 119 Mo. 50, assume that the municipal assembly before granting permission will inquire and determine whether the place and the neighborhood is a proper one in which to allow a dairy to be maintained and will act impartially. "Such favorable presumptions are constantly indulged in regard to legislative action." State *ex rel. v.* Mead, 71 Mo. 272.

It is at once apparent that no iron clad rule can fit every case. The assembly may well determine that the keeping of a dairy in the outskirts of a city where the population is sparse and the areas large would not be a nuisance whereas to permit a dairy in the

thickly populated portion of the city, or near a school house, church, or hospital, would seriously endanger the public health, and in the exercise of its plenary powers permit it in the one case, and prohibit it in the other, without being obnoxious to the criticism of partiality. Under the charter it is given legislative discretion in this matter. In our opinion the ordinance prescribed the limits and it was entirely proper and lawful to require every person desiring to erect or maintain a dairy to obtain permission by a proper ordinance and such an ordinance is the only defence to an action like this. City *v.* Howard, 119 Mo. 47.

We can see no more objection to such an ordinance than could be urged against the granting of a franchise to run a street railroad on a particular street.

A railroad laid in a street without authority is a nuisance and yet it has never been held that an ordinance to be valid must permit everybody to maintain railways in all the streets.

It is a matter within the authority of the assembly.

II.

As to the objection that the ordinance violates the 14th amendment to the Constitution of the United States, it is sufficient to say that it does not contravene that amendment because it operates upon all persons alike, and that every man holds his property subject to the maxim that he must so use it as not to injure his neighbor.

Nothing in that amendment has shorn the States of their police power to prohibit or regulate unwholesome trades and occupations. Slaughter House Cases, 16 Wall., 36; Tiedeman's State & Federal Control of Personal & Property, p. 731; *In re* Linahan, 72 Cal. 114; State *v.* Broadbelt, 89 Md. 565; 2 Kent Com. 340; City of St. Louis *v.* Howard, 119 Mo. 47; Eichenlaub *vs.* St. Joseph, 113 Mo. 395.

Nothing in the Constitution of the United States or of this State secures to any man the right to maintain a nuisance to the discomfort and peril of the health of his neighbor.

It is not deemed necessary to answer seriatim all the objections urged to the constitutionality of this ordinance. We have considered them all and are satisfied they are not tenable or sound. There is nothing retrospective in the application of this ordinance to defendant. It was adopted in 1896. He began without the permission of a proper ordinance to carry on and maintain this dairy at the premises mentioned in the complaint in 1898, long after the ordinance was in *froce*.

The ordinance is levelled at the maintenance of a dairy, the keeping of cows for the sale of milk, and the mere fact that the premises had once been so occupied prior to 1896, but subsequently abandoned for such a use, did not authorize defendant to start up a new dairy on said premises without the necessary condition pre-

cedent of a lawful ordinance. Accordingly we hold his conviction was proper and the judgment is affirmed.

JAS. B. GANTT.

Burgess, C. J., concurs in these views.

31 In the Supreme Court of Missouri, Court in Banc, October Term, 1901.

THE CITY OF ST. LOUIS, Respondent,
*vs.*
JOHN G. FISCHER, Appellant.

*Per curiam:*

Upon a rehearing by the court in banc the foregoing opinion of Gantt, J., in division No. 2 is adopted by the court in banc.

Burgess, C. J., Robinson, Brace, Marshall and Valliant, J. J., concurring therein. Sherwood, J., dissenting and expressing his views in a dissenting opinion.

And afterwards to-wit, on the 1st day of March, 1902, the further following proceedings were had in said cause, viz.:

ST. LOUIS, Respondent,
*vs.*
JNO. G. FISCHER, Appellant.

Come now the said appellant by attorney, and files his motion for rehearing herein.

Which said motion for rehearing is in words and figures as follows, to-wit:

In the Supreme Court of Missouri. En Banc.

CITY OF ST. LOUIS, Respondent,
*vs.*
JOHN G. FISCHER, Appellant.
Case No. 9815.

Now comes appellant and moves the court for a rehearing and a reconsideration of this cause, for the following reasons, to-wit:

I.

(*a.*) The court has overlooked the fact that the allegation and proof do not correspond, in this:

"Allegata."—"Said defendant did at said time and place maintain said dairy and cow stable, permission so to do not having
32 been obtained from the municipal assembly by proper ordinance, said dairy and cow stable *not having been in operation*

at the time of the approval of ordinance No. 18407, to-wit: April 6th, 1896."

See page 2 of appellant's original brief.

"*Probata.*—"*At the time of the approval of ordinance No. 18,407*, o said city and State, *said premises, buildings and stable were occupied and in use* by a certain party other than this defendant, for the purpose of operating a dairy and maintaining a cow stable" etc.

See appellant's original brief p. 5.

See appellant's original brief point X, pp. 26–28.

See "Remarks" p. 5 *et seq.* of appellant's reply to respondent's brief.

(*b.*) The court has overlooked tha fact that the doctrine of strict construction must apply to sec. 5 of the ordinance and to the pleadings and proof thereunder, as heretofore stated.

See point XII, pp. 30–31, appellant's original brief.

See "Remarks" p. 5 *et seq.* appellant's reply to respondent's brief.

(*c.*) The court overlooked the fact that under the doctrine of strict construction, the municipal assembly *alone cannot enact* a *proper* ordinance.

See appellant's brief point XI, pp. 29–30.

(*d.*) The court overlooked the fact that the dairy and cow stable in question here, having been in operation at the time of the approval of ordinance No. 18,407, which was April 6, 1896, its owner had a vested right to continue it as such (subject only to the doctrine of *sic utere tuo*, etc.) or to lease or rent it to others as such, and of this right he could not be deprived except by due process of law. The ordinance could operate only as to dairies tobe erected, &c., in future. It was not levelled at dairies that *were in operation April 6, 1896*, which in section 5 of that ordinance constitute an ex-

33 ception and an exempted class.

Respectfully submitted.

LOUIS A. STEBER,
*Att'y for Appellant.*

St. Louis, Mo., Feb'y 28, 1902.

And afterwards, to-wit, on the 19th day of March, 1902, the further following proceedings were had in said cause, viz:

CITY OF ST. LOUIS, Respondent
*v.*
JOHN G. FISCHER, Appellant.

Now at this day, the court having fully considered and understood the motion heretofore filed for rehearing herein, doth order that said motion be and the same is hereby overruled.

And afterwards, to-wit, on the 30th day of June, 1902, the further following proceedings were had in said cause, viz:

In Vacation, June 30, 1902.

CITY OF ST. LOUIS, Respondent,
*vs.*
JOHN G. FISCHER, Appellant.

Now at this day, there is presented to the Honorable G. D. Burgess, chief justice of the supreme court of Missouri, in chambers, a writ of error to the Supreme Court of the United States, a citation directed to said respondent, citing and admonishing it to appear at a Supreme Court of the United States on the 30th day of July, 1902, and a bond in the sum of one thousand dollars, which said writ of error is allowed, said citation signed, and said bond approved, ordered filed and made a part of the record herein.

Which said bond is in words and figures as follows, to-wit:

Know all men by these presents, that we, John G. Fischer as principal, and Henry Steinlage and Wm. Klasing, as sureties, are held and firmly bound unto the City of St. Louis, in the full
34 and just sum of one thousand dollars, to be paid to the said City of St. Louis, to which payment well and truly to be made, we bind ourselves, heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 28th day of June, in the year of our Lord, one thousand nine hundred and two.

Whereas, lately at the October term, A. D. 1901, of the supreme court of the State of Missouri, in a suit depending in said court between The City of St. Louis, respondent, and John G. Fischer, appellant, judgment was rendered against the said John G. Fischer, appellant, as aforesaid, and the said appellant having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said City of St. Louis, citing and admonishing it to be and appear at a Supreme Court of the United States to be held at Washington, D. C., not exceeding thirty days from and after the date of the citation in said cause.

Now, the condition of the above obligation is such, that if the said John G. Fischer shall prosecute said writ to effect and answer all damages and costs, if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

J. G. FISCHER. [SEAL.]
HENRY STEINLAGE. [SEAL.]
WM. KLASING. [SEAL.]

Sealed and delivered in presence of—
JAMES R. GRAY,
*Clerk of the United States Circuit Court,*
*Eastern Division, Eastern Judicial District of Mo.*

Approved by—
G. D. BURGESS,
*Chief Justice.*

UNITED STATES OF AMERICA, } *sct:*
*Eastern District of Missouri,* }

Before me, James R. Gray, clerk of the United States circuit court, eastern division eastern judicial district of Mo., personally appeared Henry Steinlage to me well known who upon oath states that he is worth over and above his indebtedness the sum of twenty thousand dollars and that he owns real property to that amount, subject to execution in the city of St. Louis, Missouri.

HENRY STEINLAGE.

Subscribed and sworn to before me this 28th day of June, 1902.

[SEAL.] JAMES R. GRAY,
*Clerk of the United States Circuit Court,*
*Eastern Division, Eastern Judicial District of Mo.*

UNITED STATES OF AMERICA, } *sct:*
*Eastern District of Missouri,* }

Before me, James R. Gray, clerk of the United States circuit court, eastern division eastern judicial district of Mo., personally appeared William Klasing to me well known who upon oath states that he is worth over and above his indebtedness the sum of twenty thousand dollars, and that he owns real property to that amount, subject to execution in the city of St. Louis, Missouri.

WM. KLASING.

Subscribed and sworn to before me this 28th day of June, 1902.

[SEAL.] JAMES R. GRAY,
*Clerk of the United States Circuit Court,*
*Eastern Division, Eastern Judicial District of Mo.*

UNITED STATES OF AMERICA, } *sct:*
*Eastern District of Missouri,* }

I *I* do hereby certify that the parties subscribing the within bond are respectively over the age of twenty-one years and are competent to contract, and that their signatures to said bond are genuine; I further certify that said bond is good and sufficient.

Witness my hand and seal this 28th day of June, 1902.

[SEAL.] JAMES R. GRAY,
*Clerk of the United States Circuit Court,*
*Eastern Division, Eastern Judicial District of Mo.*

And afterwards to-wit, on the 16th day of July, 1902, the further following proceedings were had in said cause, viz:

CITY OF ST. LOUIS, Respondent,
*vs.*
JNO. G. FISCHER, Appellant.

Now at this day comes the said appellant by attorney, and files his assignment of errors in this cause to the Supreme Court of the United States.

Which said assignment of errors is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, October Term, 1901.

CITY OF ST. LOUIS, Respondent,
*vs.*
JOHN G. FISCHER, Appellant. } Cause No. 9815.

To the honorable the supreme court of the State of Missouri:

Now this day comes John G. Fischer, the above named appellant and defendant, and prays for a writ of error, in the above entitled cause, to the honorable the Supreme Court of the United States, and for error makes the following assignments:

*First.* That the court erred in holding and declaring that section 5 of city ordinance No. 18407 of the city of St. Louis, State of Missouri, did not contravene and was not in conflict with the fourteenth amendment to the Constitution of the United States, in these particulars, to-wit: that "No State shall make or enforce any law
37 which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" that this matter and contention was by defendant properly presented by written plea and argument, (and before trial had on the facts) in the court of first instance, wherein the original complaint was first filed and presented against him, viz: the second district police court of the city of St. Louis; that on being overruled in said matters in said police court and being therein convicted, defendant, (appellant herein,) appealed, for trial *de novo*, said cause to the court having appellate jurisdiction thereof, under the law, to-wit, the court of criminal correction of the city of St. Louis, which exists as a court of record; that again, in said court of criminal correction, defendant (appellant herein) by leave of court refiled said written plea, which upon presentation and argument was by said court overruled, to which action of the court defendant duly saved his exceptions; that after trial and conviction upon the facts presented to said court, defendant filed his motion for a new trial, and his motion in arrest of judgment, in each of which motions the defendant again presented to said court of criminal correction his contention

that the said section 5 of the ordinance of the city of St. Louis, as aforesaid, was in violation and contravention of the fourteenth amendment to the Constitution of the United States, in each of its parts; that defendant again saved his exceptions to the overruling of his said motions; that after conviction and judgment against him in the said court of criminal correction, and the saving of his exceptions thereto, defendant again appealed to this honorable court, the supreme court of Missouri, and to said court, en banc, again un-cessfully presented his various pleas as made below, and urged same by printed brief and oral argument, and that the judgment of the lower and trial court, was by the said supreme court, en banc, affirmed.

38 Wherefore, defendant (appellant herein) still believing, asserting and complaining that the said section 5 of the city ordinance as aforesaid, as fully set forth in the records of this cause, is in violation and contravention of each and all of the parts of the fourteenth amendment to the Constitution of the United States, respectfully prays that a writ of error may be granted, awarded and accorded to him, to the Supreme Court of the United States of America, for further hearing, consideration and judgment therein.

JOHN G. FISCHER,
*Defendant and Appellant,*
By LOUIS A. STEBER,
*His Attorney.*

STATE OF MISSOURI, *sct:*

I, John R. Green, clerk of the supreme court of the State of Missouri, certify that the above and foregoing is a full, true and complete transcript of the record and proceedings had and made in the supreme court of the State of Missouri in the case of City of St. Louis *vs.* John G. Fischer, as full and complete as the same remains on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in the city of Jefferson, this 16th day of July, A. D. 1902.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk,*
By SPEED MOSBY, *D. C.*

Endorsed on cover: File No. 18,803. Missouri supreme court. Term No. 204. John G. Fischer, plaintiff in error, *vs.* The City of St. Louis. Filed January 29, 1903.